

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

FRIENDS OF MOON CREEK, an  
unincorporated association,

Plaintiff,

vs.

DIAMOND LAKE IMPROVEMENT,  
ASSOCIATION, INC. et al,

Defendants.

No. CV-13-0396-JLQ

ORDER RE: MOTION HEARING  
AND SUPPLEMENTAL BRIEFING

BEFORE THE COURT are four pending Motions: Plaintiff Friends of Moon Creek's Motion for Preliminary Injunction (ECF No. 3); Defendant Anderson's Motion to Dismiss (ECF No. 39); Defendant Sorby's Motion to Dismiss (ECF No. 43); and Defendant Diamond Lake Improvement Association's Motion to Dismiss (ECF No. 51). The court held a telephonic hearing on the Motions on January 23, 2014. Mark Wilson appeared for Plaintiff Friends of Moon Creek ("Plaintiff"). James Schwartz, Senior Counsel, Office of the Attorney General appeared for Defendant Phil Anderson, Director, Washington Department of Fish and Wildlife ("Defendant Anderson"). Thomas Luciani participated on behalf of Sharon Sorby, Coordinator, Pend Oreille County Noxious Weed Control Board ("Defendant Sorby"). Ryan Poole appeared on behalf of the Diamond Lake Improvement Association, Inc., ("DLIA").

**I. Introduction**

In the Second Amended Complaint ("SAC" at ECF No.36), Plaintiff Friends of Moon Creek (an association of property owners living in Moon Creek Estates) claims that Defendants have trespassed and damaged their property. Specifically Plaintiff claims that Defendants have engaged in a project to reduce the water level of Diamond Lake which has involved herbicide applications on Moon Creek, stream dredging, beaver

1 dam destruction, and trapping and killing beavers. The Defendants are Diamond Lake  
2 Improvement Association ("DLIA") (an association of property owners living on or near  
3 Diamond Lake), Sharon Sorby, coordinator of the Pend Oreille County Noxious Weed  
4 Control Board; and Phil Anderson, Director of the Department of Fish & Wildlife.

5 Plaintiff contends that Defendants' activities on Moon Creek began in the summer  
6 of 2012. Specifically, the first herbicide application complained of is alleged to have  
7 occurred on July 6, 2012, when a "propeller driven air boat...was launched into Moon  
8 Creek over the strenuous objections of Plaintiff's members" and Plaintiff's members were  
9 allegedly "physically threatened by the boat operators". (SAC ¶ 4.3). Plaintiff further  
10 alleges that in the Fall of 2012, beaver dams were destroyed and beavers trapped and  
11 killed. (SAC ¶ 4.8).

12 Plaintiff contends that again in September 2013, Diamond Lake Improvement  
13 Association ("DLIA") was issued a Hydraulic Project Approval ("HPA") to allow for  
14 stream dredging, modification/removal of beaver dams, etc. without adequate notice to  
15 and an opportunity to object by Plaintiffs. On September 23, 2013, DLIA installed a  
16 large culvert through a beaver dam on property allegedly owned by the Plaintiffs. (SAC  
17 ¶ 4.12). Plaintiff claims that DLIA and the Dept of Fish & Wildlife have advised that  
18 additional HPAs will be issued. (SAC ¶ 4.14).

19 Defendant Anderson argues that the Department of Fish & Wildlife merely issued  
20 an HPA, and that the HPA did not allow trespass. Defendant Sorby argues that she is  
21 immune from liability pursuant to state statute and that state statutory notice provisions  
22 were followed. DLIA argues that the activities in Moon Creek undertaken by its  
23 members were done without committing trespass and that there was no taking of private  
24 property.

## 25 II. Discussion

26 The court shared with counsel its preliminary impressions and inquired of counsel  
27 on several issues. Each party then spoke to the pending Motions.

1           **A. Immunity and Jurisdiction -**

2           The court's preliminary impression is that the Eleventh Amendment does not bar  
3 this suit and that the court has subject matter jurisdiction under the so-called *Ex parte*  
4 *Young*, 209 U.S. 123 (1908) exception. "The Eleventh Amendment erects a general bar  
5 against federal lawsuits brought against a state. It does not, however, bar actions for  
6 prospective declaratory or injunctive relief against state officers in their official  
7 capacities for their alleged violations of federal law." *Coalition to Defend Affirmative*  
8 *Action v. Brown*, 674 F.3d 1128, 1133-34 (9<sup>th</sup> Cir. 2012). In determining whether the *Ex*  
9 *parte Young* exception applies, the court looks to the allegations in the complaint. See  
10 *Verizon v. Maryland Public Serv. Comm.*, 535 U.S. 635, 645 (2002) ("In determining  
11 whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a  
12 court need only conduct a straightforward inquiry into whether the complaint alleges an  
13 ongoing violation of federal law and seeks relief properly characterized as prospective.").  
14 The Supreme Court has stated that the *Ex parte Young* analysis "does not include an  
15 analysis of the merits of the claim" and that generally an allegation of an ongoing  
16 violation of federal law will be sufficient. *Verizon*, 535 U.S. at 646.

17           **B. Claim to State Statutory Immunity**

18           The statute on which Defendant Sorby relies, RCW 17.10.134, states in relevant  
19 part: "individual members or employees of a county noxious weed control board are  
20 personally immune from civil liability for damages arising from actions performed  
21 within the scope of their official duties or employment." The court is not aware of any  
22 Washington state case law discussing the scope of this statutory immunity provision.  
23 However, a state statute would not shield Sorby from a claim of a federal civil rights  
24 violation under Section 1983. See *Romstad v. Contra Costa County*, 41 Fed.Appx. 43  
25 (9<sup>th</sup> Cir. 2002) citing *Wallis v. Spencer*, 202 F.3d 1126, 1144 (9<sup>th</sup> Cir. 2000) ("Immunity  
26 under § 1983 is governed by federal law; state law cannot provide immunity from suit  
27 for federal civil rights violations."). It may be that Defendant Sorby is claiming she is

1 a state official acting in her official capacity and entitled to Eleventh Amendment  
2 immunity, but Sorby does not make that argument, instead relying on the state immunity  
3 statute. If Sorby posed such argument, it is not clear that the Pend Oreille County Weed  
4 Control Board is an instrumentality of the State for Eleventh Amendment immunity  
5 purposes. In *Beentjes v. Placer County Air Pollution Control Dist.*, 397 F.3d 775 (9<sup>th</sup>  
6 Cir. 2005), the Circuit held that a county air pollution control district was not entitled to  
7 sovereign immunity under the Eleventh Amendment. The Circuit noted that “while  
8 county action is generally state action for purposes of the Fourteenth Amendment, a  
9 county defendant is not necessarily a state defendant for purposes of the Eleventh  
10 Amendment.” *Id.* at 784 n. 10. Here, the parties have not adequately briefed whether the  
11 Pend Oreille County Weed Control Board is entitled to Eleventh Amendment immunity,  
12 or whether Sorby as the Board’s Coordinator would be.

13 The Department of Fish and Wildlife contends that this court has jurisdiction only  
14 if the Director, acting in his official capacity, has threatened to take some future action  
15 that may violate federal law. (ECF No. 60, p. 2). The Department contends that there are  
16 no pending applications for future permits, and no current orders requiring any specific  
17 performance. However, some of the HPAs have been filed as exhibits to declarations  
18 and the permits do not expire until 2016 or 2017. (See for example ECF No. 4-9).  
19 Patrick Chapman, an employee of the Dept. of Fish & Wildlife filed a declaration stating  
20 that there is an **active** HPA # 127229-03, issued to DLIA for dredging and installation  
21 of beaver dam tubes. (ECF No. 39-1, ¶ 2(b)(iii)). At oral argument, counsel for  
22 Defendant Anderson again confirmed that the HPA remains in effect.

### 23 C. Additional Issues

24 The court posed several questions at the commencement of the hearing. Counsel  
25 shall feel free to address any of those questions at further length in the supplemental  
26 briefing. The parties should address *Cassettari v. County of Nevada*, 824 F.2d 735 (9<sup>th</sup>  
27 Cir. 1987) and *Sinaloa Lake Owners Ass’n v. City of Simi Valley*, 864 F.2d 1475 (9<sup>th</sup> Cir.

1 1989) which were not discussed in the briefing. The court is also interested in additional  
2 briefing as to what notice was provided, or is required to be provided, prior to the  
3 herbicide permit issuance and subsequent spraying and prior to the issuance of the HPA.  
4 It appeared to be Defendant Anderson's position that no notice is required prior to the  
5 issuance of the HPA and that the State provides no notice prior to work being performed  
6 pursuant to the HPA. Mr. Poole, on behalf of DLIA, argued that there had been no  
7 trespass (a factual question) and that there had been no 'taking' as Plaintiff's members  
8 had no property interest in the weeds or the beaver dams. DLIA shall address that  
9 argument further in its supplemental briefing, as well as address how the Declarations  
10 of Plaintiff's members fail to allege a loss of property. For example: Mark Moeser states  
11 that the beaver pond on his property was destroyed by the Defendants' activity and that  
12 this has dramatically decreased his property value (ECF No. 7); Doug Anderson operates  
13 SpruceWood Farms from his 5 acre parcel and sells plants, trees, and shrubs. He alleges  
14 that he sells organic products and they have been contaminated by the herbicide  
15 application (ECF No. 8); and Michele Bowyer alleges that the herbicide application  
16 contaminated the well on her property.

17 **IT IS HEREBY ORDERED:**

18 1. The parties shall submit supplemental briefing addressing the issues raised by  
19 the Court at the hearing and in this Order.

20 2. The briefs shall be submitted **on February 13, 2014, at or before noon**. The  
21 briefs shall **not exceed 10 pages** and there shall be no response or reply briefing.

22 3. Ruling on the pending Motions (ECF Nos. 3, 39, 43, & 51) is **RESERVED**.

23 **IT IS SO ORDERED.** The Clerk shall enter this Order and furnish copies to  
24 counsel.

25 Dated this 27<sup>th</sup> day of January, 2014.

26 s/ Justin L. Quackenbush  
27 JUSTIN L. QUACKENBUSH  
28 SENIOR UNITED STATES DISTRICT JUDGE